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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of GABRIEL and
LOURDES LOPEZ.

2d Civil No. B205938
(Super. Ct. No. 01221034)
(Santa Barbara County)

GABRIEL MILLOS,

Appellant,

v.

LOURDES LOPEZ,

Respondent.

In this dissolution of marriage action, Husband challenges the trial court's child support order. Wife returned with the parties' three minor children to her native Bolivia. Husband claims the trial court denied him due process by ordering him to pay child support when it has no jurisdiction over custody and visitation of the children. Husband also claims that if a child support award is proper, the trial court abused its discretion in failing to consider Husband's cost of travel to Bolivia and the difference in the cost of living between California and Bolivia. We remand for the trial court to hold a hearing to consider the amount of support in light of the cost of living in Bolivia. In all other respects we affirm.

FACTS

Husband and Wife were married in 1996. There are three minor children of the marriage. In 2003, Wife returned to her native Bolivia with the children.

In July 2006, Husband petitioned for dissolution of the marriage. He requested that the "court enter a plan regarding the minor children." He acknowledged, however, that the children have lived in Bolivia since 2004.

In August 2007, Wife filed an order to show cause seeking child custody and child and spousal support. She declared that Husband has not sent any child or spousal support since November 2005, and that she has not heard from him since the summer of 2006. She said that she and her children are destitute.

In opposition, Husband filed an affidavit stating he was making a special appearance to challenge the court's jurisdiction over child custody and support. Husband declared: Wife demanded a divorce in 2005. After the demand, she stopped letting him speak to his children by telephone. When Husband refused to turn over his tax refund to Wife in April 2006, she began to restrict access to his children. He said he makes about \$100,000 per year and has sent Wife \$84,000 since April 2004.

Wife filed an affidavit in response. She declared: "I did file an action in Bolivia for dissolution and support last year but was unable to proceed because the Father lives in California and would not consent to jurisdiction." Husband does not reside, earn wages or possess assets in Bolivia. Husband has not paid over \$80,000 to support his family since they moved to Bolivia and has failed to submit any proof thereof. Wife also declared: "At no time have I ever been opposed to [Husband] seeing his daughters, as long as he assists his daughters with money for their needs and expenses."

The court found it has jurisdiction, and denied Husband's motion to dismiss Wife's order to show cause. The court awarded joint legal custody and primary physical custody to Wife. The court awarded Husband visitation rights

including reasonable access by telephone and the internet. The court also ordered husband to pay \$3,365 per month in child support.

DISCUSSION

I

Wife contends Husband's appeal is untimely.

California Rules of Court, rule 8.104(a) requires a notice of appeal to be filed on or before the earliest of:

"(1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed;

"(2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or

"(3) 180 days after the entry of judgment."

Here the record shows a minute order awarding custody and temporary child support dated October 11, 2007. A formal order awarding custody and temporary child support was signed by the court on December 13, 2007. Also on December 13, 2007, the record shows a minute order awarding permanent support. Wife does not point to any "Notice of Entry" or file-stamped copy of the judgment having been served. On February 11, 2008, Husband filed his notice of appeal from the judgment entered on December 13, 2007.

Wife argues Husband's notice of appeal is untimely because it was not filed within 60 days of October 11, 2007. But the October 11, 2007, minute order resulted in a formal order signed December 13, 2007. Where a formal order is required, the minute order is not appealable. (See *In re Marriage of Wood* (1983) 141 Cal.App.3d 671, 677.) Here the trial court requested one of the parties to prepare a formal order. Thus even had a Notice of Entry or a file-stamped copy of the judgment been served on December 13, 2007, the notice of appeal would have

been timely. But because no such document was served, Husband had 180 days to appeal. The notice of appeal is clearly timely.

II

Husband contends ordering him to pay child support without affording him a way to enjoy custody and visitation denies him due process of law.

Husband argues the trial court has no jurisdiction to make custody and visitation orders for his children, who reside in Bolivia. (Citing Fam. Code, § 3421.)¹ Husband raises no issues on appeal attacking substance of the trial court's custody order. He appears to raise lack of jurisdiction to make a custody order solely in support of his due process argument attacking the child support order.

Husband concedes that section 3556 expressly provides that the duty to pay child support is unaffected by the custodial parent's failure or refusal to implement custody or visitation rights.² He points out, however, that he has a constitutionally-protected liberty interest in the care, custody and control of his children. (Citing *Troxel v. Granville* (2000) 530 U.S. 57, 65.)

Undoubtedly, Husband has a liberty interest in custody and visitation of his children. But a child support order does not interfere with custody or visitation. Husband points to no liberty interest that would allow him to abandon the financial support of his children. Thus, the trial court's alleged lack of jurisdiction over custody and visitation does not implicate due process in awarding child support. Visitation and child support are separate rights with separate remedies. (*In re Marriage of Tibbett* (1990) 218 Cal.App.3d 1249, 1253.)

¹ All statutory references are to the Family Code.

² Section 3556 provides: "The existence or enforcement of a duty of support owed by a noncustodial parent for the support of a minor child is not affected by a failure or refusal by the custodial parent to implement any rights as to custody or visitation granted by a court to the noncustodial parent."

Husband's reliance on *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, is misplaced. There the court entered an order allowing the mother to move with the parties' minor children from California to Australia. The court discussed enforcement of a California court's custody order in a foreign jurisdiction. The court suggested the possibility that spousal or child support might be reduced or terminated "should the moving parent frustrate the custody and visitation provisions in the California court's order and the foreign court refused to enforce those provisions." (*Id.* at p. 548, fn. omitted.)

The court's discussion is clearly dicta. Husband points to nothing in section 3556 that provides an exception for children living in a foreign jurisdiction. Moreover, Husband does not suggest he attempted to enforce custody or visitation rights in Bolivia. Even if the California courts lack jurisdiction over custody, it is possible a Bolivian court might issue a similar custody and visitation order.

III

Husband contends the trial court abused its discretion in not considering his cost of traveling to Bolivia or the cost of living there.

At the first hearing in October 2007, Husband raised the question of travel expenses and the disparity in the cost of living. The court suggested that the attorneys for the parties get together and reach some agreement as to what the standard of living is in Bolivia. The court stated, "I'm completely open to introducing that element. They may very well need less money than if they were living in Santa Barbara." The court continued the hearing to determine the amount of child support.

When Husband renewed his argument at the continued hearing, the court stated: "And I'll tell you at the first blush, . . . if you're going to make that argument, I don't know what the standard of living is in any other country. But California law is what we're adopting and using in this case. And I don't think that there is any authority in California law for the proposition that you're presenting

that there's a discount factor that I put into the DissoMaster based on a different standard of living in a foreign jurisdiction."

The only authority Husband cited to the court was "[c]ommonsense."

Husband argued the disparity in the cost of living between California and Bolivia is "huge." When the court asked, "How do you know this?" Husband replied, "Well, just go on line." When the court expressed its doubt about setting an amount of child support based on internet research, Husband replied, "Well, what am I supposed to use, your honor?"

Husband cites no authority in his opening brief that would require the court to adjust his child support obligation for his travel expenses or for a difference in the cost of living. In spite of the trial court's request for authority, it is only in his reply brief on appeal that he cites authority. (Citing *Wilson v. Shea* (2001) 87 Cal.App.4th 887.) Where the trial court asks for authority, it is difficult to conclude it abused its discretion based on authority not cited to it.

Moreover, Husband presented no evidence on his claim for travel costs or the cost of living that the trial court was bound to accept. Husband's income and expense declaration lists \$500 per month for visitation travel expenses. But he points to no evidence presented at the hearing to support that amount. Nor did Husband present any admissible evidence of the difference in the cost of living between California and Bolivia. The trial court properly rejected Husband's suggestion that the difference in the cost of living could be determined through an internet search. Husband presents no authority that an internet search would produce any admissible evidence.

Finally, contrary to Husband's assertion, the trial court did not prohibit or even discourage Husband from offering such evidence. It appears the trial court expressed doubt "at the first blush" that there was any authority for adjusting child support based on a difference in the cost of living. Thereafter the trial court patiently listened to Husband's argument. Husband never offered any admissible evidence to support his claims.

We appreciate the court's dilemma. Nevertheless, the court's comment concerning the primacy of California law and its doubt about the applicability of the standard of living of a foreign country, creates slightly more than a modicum of ambiguity about its rationale. Out of an abundance of caution, we remand for the court to hold a hearing to once again consider the issue of support. This, of course, assumes that this time the court will have before it admissible evidence and authority to make a reasoned decision.

We express no opinion on what the court's decision should be. The matter is remanded for further hearing on the amount of support. In all other respects we affirm. Costs are awarded to Wife.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Denise De Bellefeuille, Judge

Superior Court County of Santa Barbara

Drury Pullen, Susanna V. Pullen; Lascher & Lascher, Wendy Lascher
and Eric R. Reed for Appellant.

Haims, Valentino & Latchaw, Carole N. Valentino and Martin T. Lee
for Respondent.